No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF CHRIS COX, FORMER MEMBER OF CONGRESS, JAMES S. GILMORE III, FORMER GOVERNOR OF VIRGINIA, AND NETCHOICE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Chris Cox is a former United States Representative (R-CA), who with current United States Senator Ron Wyden (D-OR) is the co-author of the Internet Tax Freedom Act ("ITFA").[2] The Act prohibits specific kinds of taxes affecting Internet commerce. It also established a process by which Congress and the States can address the subject of State efforts to impose sales and use tax collection responsibilities on out-of-state vendors. Mr. Cox has for many years been a leading participant in that ongoing process and in congressional deliberations on these issues. He is thus able to bring to the attention of the Court relevant matters not already addressed by the parties.

James S. Gilmore III is a former Governor and Attorney General of Virginia. He also served as Chairman of the Advisory Commission on Electronic Commerce, created by the ITFA. In this capacity he led the discussions and debates that resulted in recommendations to the Congress for an approach to State taxation of Internet commerce that would achieve the congressionally mandated goals of simplicity, efficiency, and fairness. As a former Governor, he is sympathetic to the regulatory and taxing prerogatives and needs of the States.

NetChoice is a national trade association of e-commerce businesses and online consumers who

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[1] This brief is filed pursuant to the parties' blanket consent. No party or counsel for a party has authored or contributed monetarily to the preparation or submission of any portion of this brief.

[2] Pub. L. No. 105–277, § 1100, 112 Stat. 2681-719 (1998) (made permanent in Pub. L. No. 114–125, § 922(a), 130 Stat. 281, on February 24, 2016 (codified at 47 U.S.C. § 151 note)).

share the goal of promoting convenience, choice, and commerce on the Internet. For over a decade, NetChoice has participated in the deliberations of the Streamlined Sales Tax Governing Board, of which 23 states are currently members, with a view to minimizing burdens on small business, making the Internet more accessible, and promoting economic growth through e-commerce.

SUMMARY OF ARGUMENT

South Dakota has enacted a law that it acknowledges violates this Court's precedents. Its transparent purpose was to provoke litigation that, it hopes, will be rewarded by the Court's reversal of its prior rulings. But the law that has thus far been held unconstitutional under the Commerce Clause violates both the letter and the policy of the ITFA as well. It does so in ways that should impact this Court's analysis under both the Commerce Clause and the Due Process Clause.

This Court's decision in *Quill* v. *North Dakota*[3] rested upon the Court's dormant Commerce Clause jurisprudence, under which the Court assesses the constitutionality of state regulation of interstate commerce "in the absence of any action by Congress."[4] The present case, however, is not of this type, because Congress has not been dormant in this area.

Indeed, Congress repeatedly has expressed its view of the tax issues in this case. Exercising its authority over interstate commerce, Congress enacted the ITFA in 1998, after this Court's decision in *Quill*. On eight subsequent occasions Congress revisited the law and

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[3] 504 U.S. 298 (1992).

[4] *Id.* at 309.

reaffirmed its policy. Most recently, Congress made the law permanent in 2016.

The principal purpose of the ITFA is to prevent commerce over the Internet—uniquely interstate because of its decentralized, packet-switched architecture—from being subjected to burdensome taxation across thousands of state and local taxing jurisdictions. To this end, the ITFA flatly prohibits state and local governments from establishing unique tax rules for Internet transactions.[5]

South Dakota's law violates the ITFA by imposing burdens on Internet transactions that retailers using other channels are not required to bear. South Dakota's law also violates the ITFA by assigning the tax collection burden to a different person than in the case of interstate transactions accomplished through other means. And it does so based solely on the fact that consumers in South Dakota access a remote seller's out-of-state computer servers. Each of these features of the South Dakota law violates the explicit language of the ITFA. The Solicitor General's suggestion that the Court can simply limit *Quill* to catalog sellers and discriminate for Commerce Clause purposes between catalog sellers and Internet commerce also would violate the ITFA.[6]

South Dakota also would have this Court ignore the explicit policy aims of the ITFA, by substituting its own preferred national policy for that established by Congress. If this Court were to follow South Dakota and its *amici*'s recommendation, it would, in effect, expand the dormant Commerce Clause to an area

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[5] See ITFA §§ 1105(2)(A)-(B).

[6] See U.S. Br. 24-25.

where Congress has exercised its Article I power, in order to overrule that very exercise. The result of overturning *Quill* would be to force small Internet sellers to comply with the conflicting rules of thousands of differentiated taxing sub-jurisdictions. The non-Internet merchant would have no such burden. This is precisely the result ITFA sought to avoid as a matter of national policy.

South Dakota makes not legal but policy arguments in urging reversal of established case law. But because this lawsuit is a contrivance, the Court has been deprived of any rigorous fact finding to test the validity of South Dakota's policy claims. As a result, South Dakota's policy-based arguments have not been subjected to challenge and scrutiny in the lower courts. Yet many of these claims, including the State's assertions that its sales tax revenues are declining, are provably false. See Part III.C, *infra*.

Most consequentially, the absence of any meaningful factual record has deprived the Court of a reliable basis for ruling that the South Dakota law is facially consistent with the requirements of the Due Process and Commerce Clauses—the former concerned with fairness for the individual retailer, and the latter with the effects of State regulation on the national economy.[7]

In *Quill*, this Court confronted a corporation that spent heavily to direct thousands of catalogs into North Dakota, rather than passively receive orders from that State. Minimum contacts were thus established under Due Process. By contrast, an individual who merely maintains a website does not purposely direct his or her activity to any specific foreign State. The Internet does not allow one to avoid a particular

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[7] *Quill*, 504 U.S. at 312.

jurisdiction. A website established to reach customers around the corner necessarily also reaches customers around the Nation. Passively receiving orders that arise merely from maintaining a website is very different from deliberately aiming "a deluge" of catalogs or sales representatives at a particular State.[8]

The South Dakota statute's extremely low minimum delivery thresholds will inescapably violate the minimum contacts requirements which neither this Court nor Congress can waive. See Part II, *infra*. This is especially so since a Court decision to overturn *Quill* would have immediate national application. The 40 State *amici* have clearly signaled they intend to follow South Dakota's lead—quickly subjecting an online retailer in a single State to *in personam* jurisdiction everywhere. This would impose wildly disproportionate burdens on a small Internet retailer with a single location, as compared to a non-Internet retailer with a single location, shredding the Due Process guarantee of fundamental fairness and driving out many current competitors to the established Internet giants. The resulting injury to the national economy also would violate the Commerce Clause. The South Dakota statute is thus doubly constitutionally infirm.

It is understandable that States seek to expand their revenues. It is equally understandable that Congress seeks to protect individuals from unfair tax and regulatory demands by foreign States. Balancing these competing interests is possible but requires nuance. Overruling *Quill* undoubtedly will create a host of new policy problems: *e.g.*, extraterritorial taxation and regulation of non-citizens who cannot vote

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[8] *Id.* at 308.

and do not consume the State's services, disproportionate burdens on Internet commerce, and irreconcilable conflict among State and local compliance regimes. Nuanced legislation and a thorough exploration of the facts and the economics is needed to avoid these unintended consequences. As Justice Ginsburg has recently observed, "there is nothing nuanced" about what courts do by deciding a case one way or the other, while Congress "can write a statute that takes account of various interests."[9]

Accordingly, this Court should reject Petitioner's invitation to enter the policymaking arena—especially in a manner that would upset settled expectations, violate clear congressional policy, and countenance violations of both the Commerce Clause and Due Process.

ARGUMENT

I. SOUTH DAKOTA'S LAW VIOLATES THE COMMERCE CLAUSE BY VIRTUE OF THE INTERNET TAX FREEDOM ACT AND THE FEDERAL POLICY TOWARD INTERNET COMMERCE IT ESTABLISHED.

Congress has spoken directly and repeatedly to the tax issues in this case, and has done so largely in reliance on the core holding of *Quill*—that, consistent with the Commerce Clause, a State should not impose tax collection obligations on remote sellers with no physical nexus to the State. It did so first in 1998, when it enacted the Internet Tax Freedom Act ("ITFA"),

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[9] Oral Argument Transcript, *United States* v. *Microsoft*, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17-2_9pl4.pdf, at 6.

and again in 2001, 2004, 2007, 2014, and 2016, ultimately making the ITFA permanent in that year.

When the ITFA was signed into law by President Bill Clinton on October 21, 1998, it was a rare bipartisan accomplishment. It passed the U.S. House by unanimous consent in July 1998, H.R. 4105, 105th Cong. (1998), while the Senate companion bill, S. 442, 105th Cong. (2d Sess. 1998), passed the U.S. Senate by a vote of 96-2 in October 1998. At the conclusion of the 105th Congress, many observers viewed the ITFA as historic and one of Congress's most important and substantive accomplishments.[10]

The law, however, was never popular with State governments. Only four Governors endorsed it. The National League of Cities, the National Governors' Association, the U.S. Conference of Mayors, the National Association of Counties, and the National Conference of State Legislatures all worked against it, because all

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[10] On March 13, 1997, Rep. Cox introduced H.R. 1054, titled the "Internet Tax Freedom Act," in the U.S. House, and Sen. Wyden introduced it in the Senate, where it was designated S. 442. Subsequently, Rep. Cox introduced two updated versions: H.R. 3849, in May 1998; and H.R. 4105, in June 1998. H.R. 4105 passed the U.S. House by unanimous consent in July 1998, see H.R. 4105 – Internet Tax Freedom Act, CONGRESS.GOV, https://www.congress.gov/bill/105th-congress/house-bill/4105/all-actions, while the Senate companion bill, S. 442, passed the U.S. Senate by a vote of 96-2 in October 1998, S.442 – Internet Tax Freedom Act, CONGRESS.GOV, https://www.congress.gov/bill/105th-congress/senate-bill/442/actions. The ITFA was then added to the omnibus appropriations bill for that year, and signed into law by President Clinton as Titles XI and XII of Pub. L. No. 105-277, on October 21, 1998. It is codified as a note to 47 U.S.C. § 151. The ITFA as originally enacted imposed a moratorium on discriminatory taxation of electronic commerce. The law was subsequently extended on multiple occasions by Congress, and in February 2016, it was made permanent. Pub. L. No. 114-125, § 992(a) (Feb. 24, 2016).

wanted to lay claim to their piece of the Internet. Cities had taxed and regulated cable TV as if it were a public utility, and they saw the Internet as no different. But in Congress and the White House, the uniquely interstate—indeed, global—characteristics of the Internet featured more prominently in policy making. Indeed, the White House pointed to "the Internet's special characteristics" as reason for its concern "about possible moves by state and local tax authorities to target electronic commerce."[11]

The policy arguments made by South Dakota in this case are the same arguments it and other States unsuccessfully made to Congress during the recurring debates over the ITFA. South Dakota and its sister States, along with counties, municipalities, and territorial governments, claim, now as then, that they will exert only a light touch when it comes to regulatory burden; that even though there are over 12,000 taxing jurisdictions with conflicting rules, the collective compliance burden will not abuse "traditional notions of fair play and substantial justice;"[12] and that it is their prerogative as States to protect in-state commerce from the unwanted disruption of Internet business models and out-of-state sellers.

These same arguments were made in 2016, when Congress made the ITFA permanent. Claiming the law would "substantially reduce revenues" for the States, its original opponents from 1998—including the National Governors Association, the National Association of

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[11] "The Framework for Global Electronic Commerce," THE WHITE HOUSE, § I.1 (1998).

[12] *Int'l Shoe Co.* v. *Washington*, 326 U. S. 310, 316 (1945).

Counties, the National League of Cities, and the U.S. Conference of Mayors—all opposed it anew.[13]

Congress and the White House, in 1998 and 2016 and all points in between, believed otherwise. The specter of multiple States and municipalities all simultaneously taxing and regulating commerce on the Internet was seen as the far greater concern. Congress believed the increase in GDP facilitated by Internet commerce would indirectly boost state revenues, offsetting claimed revenue losses. The fact that large in-state sellers would be challenged by small enterprises via the Internet was seen as a boon to competition and consumers alike.

Congress was particularly concerned with the impacts on small business. As stated in the Committee Report accompanying the ITFA in the Senate, the Internet "offers advantages such as providing small- and medium-sized companies the opportunity to compete with multinational conglomerates." But, the Report noted, there are thousands of state and local taxing jurisdictions in the United States, and "the potential costs of complying with the tax demands of these authorities could make use of the Internet uneconomical for such companies."[14]

Congress enacted the ITFA to achieve the benefits of Internet commerce through a national policy that does not burden small and micro enterprises on the

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[13] H.R. Rep. No. 113-510, "Dissenting Views," at 16 (2014) (discussing H.R. 3086, the Permanent Internet Tax Freedom Act).

[14] S. Rep. No. 105-184, at 2-3 (1998) (discussing S. 442, the Internet Tax Freedom Act).

Internet by forcing them to comply with thousands of varying state and local tax regimes.

A. Congress Has Recognized the Unique Vulnerability of Internet Commerce to Tax Compliance Burdens from Multiple States.

"Most State and local commercial tax codes," the Senate Commerce Committee observed at the time of enactment of the ITFA, "were enacted prior to the development of the Internet and electronic commerce. Efforts to impose these codes without any adjustment to Internet communications, transactions or services . . . will lead to State and local taxes that are imposed in unpredictable and overly burdensome ways."[15]

The Internet's decentralized, packet-switched architecture has no precedent in U.S. or global commerce. While equally revolutionary when introduced, the telephone and telegraph are point-to-point communications. There is a point of origin and a terminus. A website, in contrast, has a unique point of origin (say, a small business's garage) that is immediately and uninterruptedly exposed to billions of Internet users in every U.S. jurisdiction and around the planet. This makes Internet commerce, unlike mail-order sales or telephone sales, uniquely vulnerable to tax and regulatory burdens in thousands of jurisdictions.

So too does the fact that the Internet is utterly indifferent to State borders. In its nearly instant transit, an email from one cubicle to another in the same office may be atomized and routed in pieces through servers in multiple States before reaching its destination a few feet away. A small business that

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[15] *Id.* at 3.

maintains a website cannot choose whether to purposely avail itself of one or another jurisdiction.

These characteristics of the Internet, Congress recognized in the ITFA, would subject it to extravagant claims of nexus and a confusing patchwork of thousands of state and local taxing jurisdictions, unless federal policy remedied the situation. These fundamental characteristics of the Internet have not changed. Neither have the States' extravagant claims of nexus that Congress rejected.

B. State Sales Taxes Can Violate the ITFA's Ban on Burdensome Taxes.

The ITFA provides that "No State . . . may impose . . . discriminatory taxes on electronic commerce."[16] "Discriminatory" in the ITFA has a specialized meaning. A discriminatory tax is one that "is not generally imposed and legally collectible . . . on transactions involving similar property, goods, services, or information accomplished through other means."[17] The definition also includes any state tax that "imposes an obligation to collect or pay the tax on a different person . . . than in the case of transactions . . . accomplished through other means."[18]

Importantly, the ITFA's protection of Internet commerce goes beyond requiring neutrality between the tax regimes for Internet and non-Internet commerce. Apart from any comparison with other forms of commerce, the ITFA expressly prohibits any tax if "the sole ability to access a site on a remote seller's out-of-State computer server *is considered a factor* in determining

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[16] ITFA § 1101(a).

[17] *Id.* § 1105(2)(A)(i).

[18] *Id.* § 1105(2)(A)(iii).

a remote seller's tax collection obligation."[19] Thus, Congress prohibited any State from *even considering* in its nexus determination the fact that consumers in the State can access the remote seller's out-of-state computer server.

The plain language of the ITFA encompasses sales and use taxes.[20] Indeed, sales and use taxes were a particular concern of the ITFA, as is evident from the fact that, in crafting the law, Congress stated its express reliance upon *Quill*'s physical presence rule for nexus.[21]

Congress openly worried that even *Quill*'s bright-line test might not be enough to protect small businesses from the burdens of having to comply with the laws, rules, filing requirements, and audits of so many jurisdictions. "These traditional notions of nexus," the Senate Committee Report states, referring to *Quill*, "are difficult to apply to the Internet because of the way that Internet transactions occur."[22]

In lieu of committee reports from the House Judiciary and Energy & Commerce Committees, the statement from Rep. Cox, the author of the bill, was published in the Congressional Record ("Statement of Intent").[23] No contrary statement of intent was ever made by any co-sponsor or supporter of the ITFA in either the Senate or the House. The ITFA, explains the Statement of Intent, is intended to provide "certainty" that the rules of *Quill*'s physical-presence test "will

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[19] *Id.* § 1105(2)(B)(i) (emphasis added).

[20] *Id.* § 1105(2)(A).

[21] S. Rep. No. 105-184, at 2.

[22] *Ibid.*

[23] 144 Cong. Rec. E1288-03 (June 23, 1998).

continue to apply to electronic commerce just as they apply to mail-order commerce, unless and until a future Congress decides to alter the current nexus requirements."[24]

C. The ITFA Applies to the Taxes on Internet Transactions That Are the Subject of South Dakota's Law.

As noted, the ITFA prohibits any tax imposed differently on Internet commerce. The law specifically prohibits assigning the tax collection burden to a different person in Internet and non-Internet transactions. And it prohibits considering the fact that in-state consumers can access the remote seller's website as a factor for determining nexus. The South Dakota law violates each of these ITFA requirements.

The South Dakota law assigns the tax collection burden differently in retail transactions involving out-of-state sellers and South Dakota purchasers, depending on whether the transaction is made in person or remotely (that is, via the Internet, catalog, or phone).

When, for example, a resident of South Dakota buys furniture from a retailer in Montana—picking up the goods herself, and bringing them home—South Dakota law requires her to pay use tax. But South Dakota does not impose a use tax collection burden on the out-of-state seller.[25]

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[24] *Ibid.*

[25] This is the flip side of South Dakota's merciful treatment of its in-state retailers, who are not required to collect tax on sales to non-residents if possession is taken outside of South Dakota. See South Dakota Department of Revenue, Sales and Use Tax Guide, 3 (July 2017). Nor does South Dakota enforce its use taxes against its own residents, over whom it unquestionably has

Unless, that is, the out-of-state seller is an Internet vendor.

In that case, the rule is different. If the furniture purchase is accomplished via the Internet (or via the telephone, or the mail), South Dakota's new law *does* require the Montana seller to collect and pay, even though Montana has no sales tax.

This differential treatment is what the ITFA prohibits. In both cases, there is a Montana seller and a South Dakota purchaser. South Dakota places the burden of tax compliance on the South Dakota purchaser if the transaction is accomplished in person. But it places an added burden of tax compliance on the Montana seller if the transaction is accomplished via the Internet.

In short, the way that South Dakota has contrived its "kill *Quill*" law[26] unavoidably burdens Internet remote sellers while sparing sellers of exactly the same property, goods, or services who don't accomplish their sales via the Internet. This violates Section 1105(2)(A)(i) of the ITFA.

Similarly, by placing the burden of tax compliance and payment on different persons when the Internet is involved (both the purchaser and seller in the case of Internet remote sales; the purchaser only in the case of non-Internet remote sales), South Dakota's law violates Section 1105(2)(A)(iii) of the ITFA.

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jurisdiction. Pet. Br. at 50 (acknowledging that "most consumers do not pay their use taxes").

[26] For a description of the "Kill *Quill*" movement among the States, see, *e.g.*, Andrew Nehring, *Internet Sales Taxes: To Kill or Not to Kill Quill?*, WASH. EXAMINER (Apr. 7, 2017, 3:23 PM), https://www.washingtonexaminer.com/internet-sales-taxes-to-kill-or-not-to-kill-quill/article/2619704.

Moreover, the sole basis on which South Dakota justifies imposing tax-collection obligations on Internet sales is the fact that South Dakota residents access the remote seller's out-of-state computer servers from South Dakota. But any tax-collection obligation premised on such a justification violates the plain terms of Section 1105(2)(B)(i) of the ITFA, which invalidates a State assertion of nexus if maintenance of a website is even considered "a factor."

The fact that the South Dakota law violates a federal statute regulating interstate commerce distinguishes this case from the dormant Commerce Clause decision in *Quill*. As then-Judge Gorsuch noted, a State can, consistent with *Quill*, "constitutionally impose tax and regulatory burdens" on remote Internet sellers if those burdens are "more or less comparable" to in-State sales and use tax collection responsibilities. *Direct Mktg. Ass'n* v. *Brohl*, 814 F.3d 1129, 1149 (10th Cir. 2016) (Gorsuch, J., concurring). But under the ITFA, the "more or less" test does not apply. The statute speaks canonically and allows no exceptions. Under Section 1105(2), a State may not impose the tax collection obligation on a different person or entity just because the arrangement is "comparable." Unless the arrangement is identical, it is prohibited.

The enactment of the ITFA was unquestionably a valid exercise of Congress's Article I power to regulate interstate commerce. Beyond the fact that the Supremacy Clause renders contrary State laws invalid,[27] the clear congressional judgment reflected in the law that taxes such as South Dakota's will unduly burden interstate commerce should inform the Court's own judgment on that subject. Unlike the dormant Commerce Clause

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[27] *Edgar* v. *MITE Corp.*, 457 U.S. 624, 631 (1982).

judgment this Court made in *Quill*, in this case the Court may reach its Commerce Clause ruling in light of the fact that Congress has, in fact, plainly expressed itself in this area.

D. South Dakota's Preferred National Policy Is Directly at Odds with the ITFA's Policy Against Multiple and Discriminatory Taxation.

In addition to violating the letter of federal law, the South Dakota law is thoroughly inconsistent with the policy aims the Congress laid out in the ITFA. The ITFA recognizes that Internet commerce is inherently susceptible to burdensome regulation and taxation simultaneously by multiple jurisdictions in ways that offline commerce is not. In addition to banning entire categories of State taxes, it focused on the need for simplification and harmonization of State tax systems as they apply to online commerce.

The ITFA's purpose of simplifying tax compliance burdens on Internet retailers was made clear by the mandate given to the Advisory Commission on Electronic Commerce. The ITFA established the Commission to help develop "model State legislation" that would provide "uniform definitions of categories of property, goods, service, or information subject to or exempt from sales and use taxes." The purpose of such state legislation would be to ensure that "transactions using the Internet . . . would be treated in a tax and technologically neutral manner *relative to other forms of remote sales*."[28]

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[28] Report to Congress of the Advisory Commission on Electronic Commerce, 70 (2000), https://govinfo.library.unt.edu/ecommerce/acec_report.pdf (emphasis added).

Over a one-year period, the 19-member Commission took live testimony from nearly 100 witnesses and experts, and hundreds more submitted written testimony. Its membership included governors, mayors, county commissioners, state lawmakers, and state tax administrators; technology experts; global trade experts; consumer and taxpayer advocates; and unique resources such as the president of the National Conference of Commissioners on Uniform State Laws. The Commission's report and recommendations fulfilled the statutory command to be "tax and technologically neutral and apply to all forms of remote commerce."[29]

The Commission recommended that State and local governments should, within three years, "simplify state and local sales and use taxation policies" in ten enumerated ways. The purpose of these simplifications is to achieve cost parity "between remote sellers and comparable single-jurisdiction vendors that do not offer remote sales."[30] The Report recognizes that Internet sellers are often small businesses located in a single jurisdiction. Thus, the point of comparison with single-jurisdiction vendors that do not offer remote sales is to avoid discriminatory burdens on one or the other.[31]

The Commission found that "substantial sales tax simplification is necessary" because "the current sales and use tax system is complex and burdensome." Without "nationwide consistency and certainty," sellers would face both "financial and logistical tax collection burdens." Foretelling the problems with alternatives

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[29] ITFA § 1102(g)(2)(D).

[30] Report to Congress of the Advisory Commission on Electronic Commerce, at 5.

[31] *Id.* at 19-20.

to simplification, such as the recently enacted "report or collect" laws in several States, the Commission noted that a tax system dependent upon "determining the identity and location of the consumer" as well as the nature of items he or she purchased was at odds with "the need to protect consumer privacy rights."[32]

The Commission reported to Congress in 2000. Consistent with the ITFA itself—and the Commission's conclusion that "fundamental uniformity and simplification of the existing system are essential"—it recommended that States work with and through the National Conference of Commissioners on Uniform State Laws to draft "a uniform sales and use tax act."[33]

South Dakota's prescription is different. Instead of simplification and multistate harmonization, it seeks simply to expand its sovereign power beyond its borders by overturning *Quill*. This, however, would make it exceedingly difficult for Congress to incentivize States to simplify their tax systems along these lines. The burdens on small Internet businesses operating in interstate commerce would thus become permanent.

To date, South Dakota and its sister States have yet to effectively achieve any semblance of uniformity in their taxing regimes, preferring to maintain their own unique tax rules, definitions, rates, and regulations.[34]

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[32] *Ibid.*

[33] See *ibid.* (recommending uniform tax base definitions, uniform and simple sourcing rules, one sales and use tax rate per state, uniform limitations on rate changes, uniform audit procedures, and uniform tax returns and remittance methods, among other things).

[34] South Dakota and less than half of the States joined the Streamlined Sales and Use Tax Agreement, which was supposed

This has left Internet sellers confronting essentially the same maze of differing state and local rules and competing definitions, deadlines, filing requirements, and audit demands that produced the ITFA in 1998 and led Congress to make the law permanent in 2016.

The national policy reflected in the ITFA is concerned with ensuring that state sales tax compliance would "not be more burdensome on a business that collects and remits taxes to several taxing jurisdictions than it is to a business that collects and remits taxes in a single taxing jurisdiction."[35] The ITFA and the Commission both addressed the overriding need "for nationwide consistency and certainty for sellers" alongside the "need to alleviate the financial and logistical tax collection burdens" on sellers. South Dakota's law would eliminate the certainty of *Quill*'s physical presence rule and expose sellers to vastly more complex and burdensome compliance requirements.[36]

In seeking to kill *Quill*, South Dakota does not recognize (or care about) these burdens. For nearly two decades it has resisted the clear congressional policy of simplification in return for extraterritorial reach. South Dakota focuses instead solely on the presumed competitive burden on its in-state businesses and its purported lost revenue. But these

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to achieve uniformity or simplicity, but has not, even among its members.

[35] Report to Congress of the Advisory Commission on Electronic Commerce, at 2.

[36] *Id.* at 19-20; Sales Tax, Avalara Resource Center, https://www.avalara.com/learn/sales-tax (noting there are over 12,000 state and local sales tax jurisdictions).

arguments were expressly rejected in the ITFA and by the Commission.

"Undue burdens on interstate commerce," as this Court noted in *Quill*, may be avoided in appropriate situations "by the demarcation of a discrete realm of commercial activity that is free from interstate taxation."[37] If this was then true of the dormant Commerce Clause, it should be profoundly so when it is Congress, not the Court, that has made the demarcation in the exercise of its power to regulate interstate commerce. This is what Congress has in fact done in the ITFA.

E. The Solicitor General's Proposal to Reinterpret *Quill* to Discriminate Against Internet Commerce Violates the ITFA.

The Solicitor General proposes that the Court limit *Quill*'s nexus requirement to mail-order catalogs. This would permit South Dakota to impose unique tax-collection obligations on remote Internet sellers that don't apply to other remote sellers.[38] The ITFA, in § 1105(2)(A)(i)–(iii), flatly prohibits this.

Congress in the ITFA prohibited any taxing regime that treats Internet sales differently from sales of similar items "accomplished through other means." Not only does the law ban imposing a tax on Internet sellers while sparing other remote sellers; it also prohibits imposing the collection obligation on a different person in one case and not the other.[39] Both

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[37] *Quill*, 504 U.S. at 314-15.

[38] U.S. Br. 24-26.

[39] ITFA § 1105(2)(A).

types of unlawful discrimination are inherent in the Solicitor General's approach.

The Solicitor General's proposal runs afoul of the ITFA in yet another way. His idea that remote Internet sellers are "virtually" present in every State where a consumer can access its website[40] violates the express prohibition against using as a factor for determining nexus the "sole ability [of persons within a State] to access a site on a remote seller's out-of-State computer server."[41] This provision of the law should foreclose any suggestion that the ability of in-state consumers to access a remote seller's website creates "a continuous presence" inside the State.[42]

II. SOUTH DAKOTA'S LAW VIOLATES THE DUE PROCESS CLAUSE.

The consideration of South Dakota's law and of *Quill* necessarily occasions evaluation of the law under the Due Process Clause. As *Quill* itself noted in parsing the two "analytically distinct" considerations, they are "closely related" in the constraints they impose on a State's power to tax and regulate beyond its borders.[43]

South Dakota's statute is radically different from the North Dakota law at issue in *Quill*. It is an extreme form of long-arm sales tax jurisdiction that asserts tax, regulatory, and (to enforce its audit and other requirements) *in personam* jurisdiction over even the smallest micro enterprises doing business online anywhere in the United States. The minimum

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[40] U.S. Br. 24-26.

[41] ITFA § 1105(2)(B)(i).

[42] U.S. Br. 24.

[43] *Quill*, 504 U.S. at 305; see also *MeadWestvaco Corp.* v. *Ill. Dep't of Revenue*, 553 U.S. 16, 24 (2008).

delivery threshold is so low that it is guaranteed to sweep in small sellers with nothing like the sufficient minimum contacts necessary to satisfy Due Process requirements.

An example will serve to illustrate.

A woman opens a small business out of her apartment in Idaho, selling iPhone cases principally over the Internet. They retail for $7. Her customers are mostly in the United States and Canada. In a typical week she fills orders primarily to New York, Florida, and Texas. She does this by going to the Post Office.

She rarely sells to customers in South Dakota—typically four iPhone cases in an entire week. Her net income is $1.49 per phone case. On those South Dakota sales, therefore, she earns $309 in a year.

Yet South Dakota's law would claim full tax and regulatory jurisdiction over the woman in this example. Despite her *de minimis* sales into South Dakota, she will be subject to the licensing, registration, audit, and fee-paying requirements of the South Dakota Department of Revenue.[44] She lacks the minimum contacts that *International Shoe* demands under "traditional notions of fair play."[45]

This Court has made clear that just as the Due Process Clause limits a State's ability to exercise *in personam* jurisdiction over a defendant in litigation, it also limits the ability of a state to tax a nonresident.[46] Due Process requires minimum contacts between

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[44] S.B. 106, 2016 Legis. Assemb., 91st Sess. § 1(2) (S.D. 2016).

[45] 326 U.S. at 316.

[46] *Quill*, 504 U.S. at 307-08.

an out-of-state party and a State creating a "substantial connection" between them before that State can exercise jurisdiction.[47] Indeed, the "defendant *himself*" must establish a relationship with "the forum State," not merely with individuals within the State.[48]

An out-of-state seller may establish contact with an individual South Dakota purchaser online, but that does not show any relationship with the State itself.[49] When a product is generally available online, it is the *buyer's* conduct—"random," "fortuitous," and "attenuated"—that results in the shipment of the product from a seller who has made no special effort to single out that particular jurisdiction.[50] Were it otherwise, everyone who sells online and ships anywhere in the United States would have minimum contacts with every State under the Due Process Clause—a proposition this Court has rejected.[51]

To establish minimum contacts, an out-of-state seller must also "deliberate[ly] engage[] in significant activities within a State" or "create[] 'continuing obligations' between himself and residents of the [State]."[52]

This Court has clearly stated that where an out-of-state seller's connection to a State is limited to isolated

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[47] *Walden* v. *Fiore*, 134 S. Ct. 1115, 1121 (2014).

[48] *Id.* at 1121-22 (quoting *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 475 (1985)).

[49] *Id.* at 1123.

[50] *Burger King*, 471 U.S. at 475.

[51] See *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 298 (1980).

[52] *Burger King*, 471 U.S. at 475-76.

occurrences of product sales,[53] or to a contract with a State resident, "sufficient minimum contacts" are not established.[54] South Dakota's law imposes tax collection obligations on out-of-state sellers regardless of whether they intentionally created a substantial relationship with that State.

Because the South Dakota law requires nothing more than 200 transactions delivering "tangible personal property [or] any product transferred electronically" into the State, it will unavoidably run afoul of the Due Process Clause. So too its alternative basis for asserting jurisdiction—the delivery of tangible and electronic products totaling only $100,000. Neither test requires intentional, significant contacts with South Dakota, and both will sweep in many sellers who lack such contacts.[55]

Consider these further examples:

If South Dakota residents download a single 99¢ song 200 times, the State will claim *in personam* jurisdiction over the faraway Internet seller.

If one person in South Dakota purchases a single expensive piece of art, the out-of-state seller immediately becomes subject to South Dakota's tax, regulatory, audit, and judicial powers.

If over the course of a year some 200 South Dakota residents receive gifts purchased online from the same Internet seller, then even if *none* of the purchasers lives in South Dakota, the online seller would become subject to South Dakota's tax-collection requirements.

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[53] *Volkswagen*, 444 U.S. at 297.

[54] *Burger King*, 471 U.S. at 478.

[55] S.B. 106, 91st Legis. Assemb. § 1 (S.D. 2016).

In none of these examples would the seller have the minimum contacts this Court has in the past required before a State can claim jurisdiction over him or her.

The Due Process problems of the South Dakota statute are made worse when the inevitable similar extraterritorial demands of other States are taken into account. South Dakota approvingly reports that "many other States have [already enacted] provisions materially identical to South Dakota's,"[56] meaning that if this Court upholds the contested law in this case, even the smallest Internet sellers will quickly be subject to nationwide compliance burdens and the competing rules, filing requirements, and audit demands of over 12,000 taxing jurisdictions. Many States will have only attenuated contacts with the thousands of small and micro enterprises who will be subject to these burdens.

It is not simply that small businesses will have to file many forms, understand many conflicting laws and rules, and collect and remit taxes for jurisdictions with which they are entirely unfamiliar. Chapters 10-45 and 10-52 of the South Dakota Codified Laws also make clear a seller can be required to travel to South Dakota to appear before its auditors, its administrative tribunals, and its courts.

This is an exceptionally disproportionate burden for a small seller who lacks meaningful contacts with South Dakota beyond maintaining a storefront on the Internet and passively receiving orders.

South Dakota's law plainly reflects its desire to expand sales tax collection responsibilities to all retail businesses, even the very small and very remote. This

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[56] Pet. at 8.

is the clear desire of most States, because they believe it will protect local businesses from unfair remote competition while increasing their tax revenue. It is precisely because this is the aim of many States that their collective ambitions threaten small Internet businesses with cumulatively crushing compliance burdens.

The violation of Due Process these small businesses face is all the more fundamentally unfair because these burdens are not borne by a similarly situated South Dakota seller who does not venture into interstate commerce.

Returning to the example of our small seller in Idaho, because she lives and works in that State, she is registered with the Idaho State Tax Commission, the Idaho Department of Labor, and the Idaho Industrial Commission. She has paid the Idaho State Tax Commission for a seller's permit, and regularly files Idaho sales tax returns. Compliance with Idaho's rules requires her, like all other businesses in Idaho, to be familiar with the State's varying tax rates and definitions of what is taxable, its audit and record-keeping requirements, and its filing requirement to file monthly sales tax reports.

As challenging as these regulatory burdens may be, they are the same for every similarly situated business in Idaho. The imposition of these burdens on her is fundamentally fair and thus consistent with Due Process.

But once she is required to comply not only with Idaho's rules, where she lives and works, but with the rules and burdens imposed by 46 different States, the equation changes. Forcing one small business, with one location, to bear this burden is fundamentally

unfair when a large in-state retailer has no such burden.

Unlike the in-state retailers whose South Dakota taxes are repaid in the form of police protection, fire protection, and all manner of public services, the Idaho seller receives nothing in return. Nor does the Idaho seller have any democratic voice to ensure the fair application of South Dakota's policies against her. Despite the command to pay taxes, she cannot vote.

The practical result of overturning *Quill*, then, will be to overburden small businesses who will immediately be subject to the distinct demands and filing requirements of thousands of taxing jurisdictions, even though they may not have substantial contacts with any of these States.

The reversal of *Quill* would not affect the large, nationwide online retailers such as Amazon, Walmart, and Apple. They already remit taxes everywhere based on their ubiquitous physical presence. Rather, this Court's decision would be acutely felt by smaller businesses. Not only would the increased burden on these sellers cause "practical problems" that Due Process protections are meant to curb,[57] but by imposing steep costs and driving some companies out of the market, it would, ironically, reduce the States' potential for increasing their tax revenues.

III. SOUTH DAKOTA'S PETITION IS NOT A LEGAL BUT A POLICY ARGUMENT WHICH LACKS EVIDENTIARY BASIS.

South Dakota seeks, by reversal of clearly established Supreme Court precedent, to win in the courts

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[57] *Bristol-Myers Squibb Co.* v. *Superior Court*, 137 S. Ct. 1773, 1780-81 (2017).

what it has been unable to win in Congress. If South Dakota succeeds, it will effectively neuter the national policy established by Congress in the ITFA. Once every website that fills orders nationally has to comply separately with the local tax laws, rules, regulations, and filing and audit requirements of 46 States, and once millions of individual sellers with a website find themselves liable to summons and the *in personam* jurisdiction of those States, it will be South Dakota's preferred national policy, not Congress's, that prevails.

A. This Action Provides No Factual Record to Support South Dakota's Alternative National Policy for Interstate Commerce.

It is not merely that South Dakota's legislative policy argument should be addressed to the Congress rather than this Court (though it should). Even were this Court a legislature, it would require an opportunity to weigh competing data on various sides of the policy argument. This case, because of the barren factual record produced by the state legislature's express-to-the-U.S. Supreme Court gimmick, has no meaningful findings of fact whatever.

Petitioner points to the "detailed findings" in the South Dakota law.[58] But there are none—save a few unsupported assertions. The law's Section 8 claims without proof that the status quo is "causing revenue losses and imminent harm."[59] As demonstrated below, this is untrue—South Dakota's sales tax revenue is increasing.

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[58] Pet. at 6. Those findings, which were repeated in the State's complaint for declaratory judgment, were specifically denied in the Respondents' answer to the complaint. Resp. Br. at 24.

[59] S.B. 106 § 8(1).

The law's other relevant "finding" is that South Dakota's proposed tax compliance burdens are "neither unusually difficult nor burdensome for remote sellers."[60] Here, too, the record is barren. The fact is that mid-market Internet retailers would have to spend $80,000 to $290,000 in integration costs just to use the "free" sales tax software discussed by Petitioner. Each year thereafter, they would incur costs between $57,500 and $260,000 for maintenance, updates, audits, and service fees.[61] Beyond this, a retailer with a single place of business would face further compliance burdens in the form of monthly, quarterly, and annual filings in the thousands of jurisdictions in all 46 States with a sales tax that follow South Dakota's footsteps. This is not to mention the time and expense of traveling to South Dakota (and to its sister States with similar laws) in response to regulators' demands.

B. South Dakota's Policy Arguments Are Flawed and Unproven.

"Internet sales," reports the Supreme Court of South Dakota in this case, "have risen," while "state revenues have decreased."[62] The sole source for this questionable assertion is the "finding" to that effect in the South Dakota law.

Had there been actual fact-finding in this case, Petitioner and the state courts would have been confronted with the State's own data showing that

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[60] *Id.* 106 § 8(6).

[61] Larry Kavanagh & Al Bessin, *The Real-World Challenges in Collecting Multi-State Sales Tax*, TRUST, 3 (Sept. 2013), http://truesimplification.org/wp-content/uploads/Final_TruST-COI-Paper-.pdf.

[62] *State* v. *Wayfair Inc.*, 901 N.W.2d 754, 756 (S.D. 2017).

sales and use tax revenue has not only grown every year for the past seven years, but it has grown at a substantially higher rate than the South Dakota economy.[63]

South Dakota Sales and Use Tax Revenue 2013-18
(in millions)

2013	2014	2015	2016	2017	2018
$787.7	$831.1	$836.5	$860.9	$974.7	$1,013.1*

The Governor's budget for 2018 projects that South Dakota's sales and use tax revenue will be *29% higher* than just five years prior.[64] The compound annual growth rate in sales and use tax revenue for the five years ending in 2016 is over 5%, compared to a compound annual growth in state GDP during that period of just 1%.[65]

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[63] South Dakota Bureau of Finance & Management, General Fund Condition Statement (2017), https://bfm.sd.gov/budget/rec18/SD_Rec_2018_Entire.pdf; South Dakota Department of Revenue, Annual Reports, 13 (2015 and 2016), http://dor.sd.gov/Publications/Annual_Reports/. These are State-level data only. Inclusion of localities' sales and use taxes would increase the amounts in the above table by approximately one-third.

* 2018 figure is the State's budget estimate.

[64] South Dakota Bureau of Finance & Management, General Fund Condition Statement (2017), *supra*. Effective July 1, 2016, the State increased its sales tax rate by 0.5%. The increase in collections for 2017 is significantly greater than would be expected from the rate increase alone. Likewise, the State's projected increase for 2018 is based on no increase in the sales tax rate compared to 2017.

[65] *South Dakota GDP*, DEP'T OF NUMBERS, http://www.deptofnumbers.com/gdp/south-dakota/ (reporting data from Bureau of Economic Analysis, U.S. Department of Commerce).

And more generally, according to the Census Bureau, state and local governments collected a record high in general sales and gross receipts taxes in 2017.[66] That number has been steadily climbing since 2009 and totaled over $386 billion in 2017.[67] Just as in South Dakota, the total revenue for all state and local taxes has never been higher.

This is the "brutal" revenue "shortfall" described by Petitioner.[68]

There are many reasons for South Dakota's current economic woes, including recurrent droughts that have hurt agricultural production.[69] But State sales tax revenues are growing, not declining, contrary to the "findings" in the South Dakota law.[70] This is another reason that the lack of any factual record in this case makes it a poor vehicle for overturning *Quill*.

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[66] Terence P. Jeffrey, *State and Local Income, Sales and Property Taxes All Hit Records in 2017*, CNSNEWS.COM (Mar. 22, 2018), https://www.cnsnews.com/news/article/terence-p-jeffrey/state-and-local-income-sales-and-property-taxes-hit-records-2017 (citing Census Bureau data).

[67] *Ibid.*

[68] Pet. at 14.

[69] South Dakota Bureau of Finance & Management, Economic and Revenue Update, 3 (Dec. 2017), https://bfm.sd.gov/econ/current.pdf.

[70] Even if tax revenues *were* falling, which they are not, South Dakota would have a difficult time establishing causation, given the various headwinds facing its regional economy.

C. Since *Quill* and *DMA II*, 'Changed Circumstances' Have Continued Changing, With Local Facilities Now Key to Retail e-Commerce

When Justice Kennedy wrote his concurrence in *Direct Marketing Ass'n* v. *Brohl* ("*DMA*"), he could speak of "the dramatic technological and social changes" driving the growth of e-commerce as distinct from brick-and-mortar retail.[71] When, the year following Justice Kennedy's opinion, then-Judge Gorsuch wrote his concurrence in *DMA II*, he could still speak intelligibly of remote Internet sellers and their "in-state brick-and-mortar rivals."[72]

That was then. No one speaks of "brick-and-mortar" any more. They now speak of "brick-and-click" as most stores have created an online presence. In 2018, not only larger retailers but even the smallest stores all sell via their own websites. Of those that do not, 92% report they plan to do so by the end of 2018.[73]

Competition in retail today no longer pits in-state brick-and-mortar stores against remote Internet sellers. The contest is between retail giants, who support the reversal of *Quill*, and small businesses.[74]

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[71] 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring).

[72] *Direct Mktg. Ass'n* v. *Brohl*, 814 F.3d 1129, 1150 (10th Cir. 2016) (Gorsuch, J., concurring).

[73] *What Percentage of Small Businesses Have Websites?*, SMALLBUSINESS.COM (Mar. 18, 2017), https://smallbusiness.com/digital-marketing/how-many-small-businesses-have-websites/.

[74] See Ike Brannon et al., *Internet Sales Taxes and the Discriminatory Burden on Remote Retailers – An Economic Analysis* (Mar. 15, 2018), at 12-13, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3140948 (explaining the national retail industry will soon "be populated predominantly by (i) national

Those small businesses—in South Dakota and elsewhere—can only compete if they are not overwhelmed with a nationwide tax compliance burden simply by virtue of selling via the Internet.[75]

Since Amazon "sent shock waves" through the retail industry in August 2017 with its acquisition of Whole Foods, the pace of change in retail has quickened dramatically.[76] Today, Walmart, Apple, Target, and Macy's all compete head-to-head with Amazon in e-commerce. All have large online businesses as well as physical stores across the country, and all charge sales tax in every jurisdiction where it is required.[77] These five entities alone accounted for around two-thirds of all Internet retail sales in 2016.[78]

Even before adding Whole Foods' hundreds of stores across the country, Amazon maintained a substantial

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chains of 'brick-and-click' retailers on the one hand, and (ii) small, nimble, remote IT-enabled retailers . . . on the other hand").

[75] *Id.* at 13-24 (explaining the "significant competitive advantages" national retail giants have over "small and remote" sellers, and how Internet taxes are "discriminatory tariff[s] on small retailers").

[76] Jennifer Kaplan & Matthew Boyle, *Amazon Cuts Whole Foods Prices as Much as 43% on First Day*, BLOOMBERG TECH. (Aug. 28, 2017), https://www.bloomberg.com/news/articles/2017-08-28/amazon-cuts-prices-at-whole-foods-as-much-as-50-on-first-day.

[77] Indeed, 17 of the largest 18 online retailers collect state and local sales taxes. See Richard Wolf, *Supreme Court will decide if online retailers must collect sales tax*, USA TODAY (Jan. 12, 2018), https://www.usatoday.com/story/news/politics/2018/01/12/supreme-court-decide-if-online-retailers-must-collect-sales-tax/1021423001.

[78] Arthur Zaczkiewicz, *Amazon, Wal-Mart and Apple Top List of Biggest E-Commerce Retailers*, WOMEN'S WEAR DAILY (Apr. 7, 2017), http://wwd.com/business-news/business-features/amazon-wal-mart-apple-biggest-e-commerce-retailers-10862796.

physical presence in all 46 U.S. States with a sales tax. By itself, Amazon accounts for over 40% of all online retail sales.[79] Like its major retail competitors, it now has warehouses, fulfillment centers, and stores across the country—allowing pick-up and returns of products purchased online.[80]

Amazon is only the most obvious example of the dominant trend in retail, which is putting pressure on established retailers from grocers to car dealers to combine e-commerce with local retail in every market.[81] It is thus unsurprising that the U.S. Government Accountability Office recently found that, as of last year, "80 percent of the potential revenue from requiring all Internet retailers to collect [sales tax] is already collectible."[82] The number is undoubtedly even higher now. Now, the lion's share of online retail has ubiquitous physical presence and their sales are already taxable.[83]

Just as "dramatic technological and social changes" intervened between *Quill* and *DMA*,[84] they have

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[79] *Amazon Accounts for 43% of US Online Retail Sales*, BUS. INSIDER (Feb. 3, 2017), http://www.businessinsider.com/amazon-accounts-for-43-of-us-online-retail-sales-2017-2.

[80] Barbara Thau, *Five Signs That Stores (Not E-Commerce) Are The Future Of Retail*, FORBES (June 27, 2017), https://www.forbes.com/sites/barbarathau/2017/06/27/five-signs-that-stores-not-online-shopping-are-the-future-of-retail/#b1b1ddb4641c; Ryan Derousseau, *You Can Now Return Amazon Purchases at a Real Store*, TIME (Oct. 23, 2017).

[81] Brannon et al., *supra*, at 11-12.

[82] SALES TAXES: STATES COULD GAIN FROM EXPANDED AUTHORITY, BUT BUSINESSES ARE LIKELY TO EXPERIENCE COMPLIANCE COSTS, GAO REPORT (Nov. 2017), at 9.

[83] Brannon et al., *supra*, at 31-32.

[84] *DMA*, 135 S. Ct. at 1135.

continued to reshape the retail industry in a way that has all but mooted the tax revenue issue, while bringing the question of the competitive viability of small Internet businesses versus Internet giants to the fore. The reversal of *Quill* will not affect the large, nationwide online retailers such as Amazon, Walmart, and Apple. But it will profoundly affect the small retailers who will suddenly face new, expensive, and disproportionate compliance burdens. As Congress foresaw when it enacted the ITFA, the lower costs of remote e-commerce are the only way for traditional small business to compete with these dominant, hybrid companies.[85]

IV. CONGRESS, NOT INDIVIDUAL STATES OR THE COURTS, IS BEST SUITED TO DEVISE A SOLUTION TO THESE COMPLEX MULTISTATE TAX POLICY ISSUES.

Congress, which is not limited to deciding cases, has more nuanced alternatives than this Court. It has been actively exploring a variety of ways to more elegantly solve these interdependent problems. For several years, beginning with the ITFA and the recommendations of the Commission authorized in that law, congressional policy has focused on requiring States to harmonize their sales tax regimes. Then, with a simplified sales tax regime for online commerce in place nationwide, Congress would authorize States to enforce collection beyond their borders. The States, as noted, have not done this, but Congress could require it as a condition of permitting extraterritorial tax enforcement.

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[85] Report to Congress of the Advisory Commission on Electronic Commerce, at 11, 14; Brannon et al., *supra*, at 10-13.

Another approach, now under active consideration in the Congress, would force remote sellers to collect, but permit them to comply by following their own State's rates and rules. The taxes collected would be paid to the seller's State, which would then remit to the purchaser's State. Through an interstate compact authorized by Congress, the amounts due among States would be netted monthly, simplifying the distribution process. Under this system, the seller would be subject to audit only in those States where it is physically present, rather than in every one of 46 States.

Unlike the Court, Congress can actively monitor developments in the marketplace and in technology. It can craft legislation aimed at striking the right public policy balance in this rapidly evolving landscape. The Court has repeatedly declined "to pre-empt congressional action by judicially decreeing what accords with" good policy.[86] It is for Congress to decide the appropriate taxation policy for e-commerce. To a substantial extent, it already has done so in the ITFA, and more legislation is likely this year.

Because "Congress remains free to alter" the *Quill* framework—and is now considering legislation to do so—the demands of *stare decisis* have special force.[87] This Court should not reject its precedent based on South Dakota's policy preferences which Congress is free to accept or (as it has already done through eight re-enactments of the ITFA) reject.

Petitioner's recommended course of action will address one purported problem by creating many

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[86] *Tenn. Valley Auth.* v. *Hill*, 437 U.S. 153, 195 (1978).

[87] *Quill*, 504 U.S. at 320 (Scalia, J., concurring in part and in the judgment).

much larger ones. The wiser course is for this Court to recognize that the interests of *stare decisis* are strongest where, as here, Congress continues to exercise its Article I authority to develop appropriate national policy.[88]

CONCLUSION

The decision of the South Dakota Supreme Court should be affirmed.

Respectfully submitted,

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[88] See *Coit Indep. Joint Venture* v. *Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561, 592 (1989) (Scalia, J., concurring) (noting Court should have deferred to the "legislative process" where "Congress is currently considering legislation").